No. 80-526

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MICHAEL RODAK

IN THE

Supreme Court of the United States

October Term, 1980

JOHN MURRAY,

Petitioner,

v.

BRANCH MOTOR EXPRESS COMPANY
and
LOCAL 557, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF OF RESPONDENT BRANCH MOTOR EXPRESS COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does an employee's failure to exhaust internal union remedies, of which he was admittedly aware and which were not demonstrated to be inadequate, bar his action against his union for an alleged breach of the duty of fair representation in the processing or handling of his grievance?

2. Does an employee's failure to exhaust internal union remedies bar his action against his employer for breach of the collective bargaining agreement, where resort to such internal remedies would have created the possibility of having the employee's contractual claim resolved through the grievance and arbitration procedure of the agreement, and obviated the necessity of suing the employer?

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BRIEF OF RESPONDENT BRANCH MOTOR EXPRESS COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

The Respondent Branch Motor Express Company respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Fourth Circuit's opinion in this case.

STATEMENT OF THE CASE

Respondent Branch Motor Express Company ("Branch") is a certified common freight carrier. It operates a freight terminal in Baltimore, Maryland at which Petitioner John Murray was employed as an over-the-road driver. Teamsters Local 557 ("Local 557") is a labor organization and is the sole and exclusive bargaining agent of the individuals employed as over-the-road drivers at Branch's Baltimore, Maryland terminal.

The collective bargaining relationship between Branch and Local 557 was governed at the time relevant to this action by the National Master Freight Agreement (hereinafter "NMFA") for the period April 1, 1973 to March 31, 1976. The NMFA is an industry-wide agreement which is supplemented by local agreements which specify additional terms and conditions applicable only to particular employers and local unions within the supplemental area. In the instant case, the NMFA is supplemented by the Maryland-District of Columbia Over-the-Road Supplemental Agreement.[1]

The grievance machinery of the NMFA is set forth in Article 45. That Article specifies several preliminary steps to be followed by the parties in an attempt to adjust a grievance short of a hearing. In the event the matter cannot be so adjusted, a hearing is held before the Joint Maryland-District of Columbia Area Committee ("JMD CAC"), and if it deadlocks, before the Eastern Conference Joint Area Committee ("ECJAC").[2] Discharge cases are

1. The NMFA and the Supplemental Agreement will be referred to collectively hereafter as "the NMFA."

2. Both the ECJAC and the JMDCAC are committees composed of an equal number of representatives of employers and local unions within the jurisdiction of the Supplemental Agreement. (NMFA, Article 44)

submitted to an impartial arbitrator after a deadlock at the JMDCAC.

Article 46 of the NMFA provides that an employer may not discharge or suspend any employee without just cause, and that the employer must give at least one warning notice of the complaint against the employee prior to discharge or suspension. The only exception to this prior warning requirement, not applicable to the instant matter, occurs when the discharge is based upon one of the nine "cardinal offenses" enumerated in the NMFA.

The 1976 Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America governs the internal affairs of the union and the relations between the International, the local and the union members. Article XIX of the Constitution establishes a comprehensive procedure for the review of the actions of local union officials. This procedure is accessible to any union member.

Section 1 of Article XIX sets forth a procedure whereby any member of a local union may charge any other member or officer of the union with a violation of any provision of the Constitution. Section 6 of that Article delineates the grounds for such charges, which include the taking of any action which ". . . . interferes with the performance or obligations of other members or local unions under the collective bargaining agreements."

Section 9 of Article XIX of the Constitution sets forth the remedies available against an accused officer or member. Among these remedies are "commands to do or perform, or refrain from doing or performing, specified acts."

The dispute giving rise to the instant litigation concerned discipline taken by Branch against Murray on two different occasions. First, on September 16, 1975 Branch discharged Murray as a result of his refusal to pay certain

road tolls; however, through the intercession of Local 557 the discharge was reduced to a disciplinary suspension with partial back pay. Thereafter, Murray allegedly was informed by his Business Agent that Branch had, as a further concession, agreed that the suspension would not "count" for purposes of future discipline. Murray then returned to work at Branch. Apparently, Murray was not satisfied with the settlement Local 557 had negotiated for him. Although he was admittedly aware of the availability of remedies under the Teamsters' Constitution to contest the actions of his Business Agent, he decided not to bring charges.

After Murray returned to work, he received a letter from Branch dated October 7, 1975 informing him that he had been suspended as part of the settlement of his grievance. The letter also warned him that a recurrence of the conduct involved, or any other infraction of the rules, would result in discipline under the contract. Thus, on or about October 7, 1975 Murray was aware of the conflicting reports from the union and the company concerning the effect of his suspension for purposes of future discipline. Nonetheless, Murray took no action either to clarify or to remedy the situation until the day of the arbitration of his subsequent discharge, as discussed below, April 22, 1976.

On January 20, 1976 Murray was discharged by Branch because of his refusal to accept a work assignment. Murray received a letter from Branch informing him of his discharge, which letter specifically referred to the prior letters sent to Murray concerning his discharge on September 16, 1975, and his later suspension of October 7, 1975. Although a grievance was filed as to the discharge of January 20, 1976, no charges were filed against his union representatives concerning the October settle-

ment, and no attempt was made within the union to clarify the terms of that settlement.

On April 22, 1976 Arbitrator Leon Sachs denied the union's grievance of the January 20 discharge, specifically holding that the October suspension of Murray had constituted the prior warning necessary to sustain the discharge. Thereafter, Murray filed an action in the United States District Court for the District of Maryland in which he alleged Branch had breached the NMFA by discharging him, and that Local 557 had breached its duty of fair representation to him both in connection with the settlement of his September, 1975 grievance and his 1976 discharge arbitration. On July 31, 1979 the district court entered summary judgment in favor of both defendants because of Murray's failure to exhaust internal union remedies. The district court concluded that if Murray had exhausted internal remedies when he became aware in October, 1975 of the problem with the settlement of his earlier grievance, that problem could have been resolved through the grievance procedure of the NMFA, and the instant litigation would have been unnecessary. That decision was affirmed by the Court of Appeals for the Fourth Circuit.

SUMMARY OF REASONS FOR DENYING THE WRIT

The holding of the court below that Murray was barred from asserting his claims against both Branch and Local 557 was based upon legal principles as to which there is no conflict among the Circuit Courts, or with any decision of this Court. The Circuit Courts have uniformly held that an employee must exhaust internal union remedies before bringing an action against his union for an alleged breach of the duty of fair representation in its processing or handling of his grievance. This Court has never expressly or impliedly held that exhaustion of such internal remedies is required only in actions involving solely internal union matters.

The decision of the court below permitting Branch to rely on the same exhaustion defense is similarly consistent with decisions of other Circuit Courts. In accordance with federal labor policy encouraging the resolution of industrial disputes through the contractual grievance and arbitration mechanism, federal courts have permitted the employer to rely on the exhaustion defense where resort to internal union remedies would have resulted in an opportunity for the underlying dispute to be presented to and resolved through the grievance machinery. The court below applied that principle, and concluded that Murray could have avoided the suit against Branch had he exhausted internal remedies. There are thus no important or compelling reasons for granting the Writ.

REASONS FOR DENYING THE WRIT

Introduction

Although Murray's Petition articulates five questions for review, they can be reduced to two essential questions: (1) whether the defense of failure to exhaust internal remedies is available in an action other than one involving solely internal union affairs; and (2) if so, whether that defense is available to the employer. The court below properly answered both questions in the affirmative. For the reasons set forth below, certiorari should be denied as to both of these issues.

I. The Issue of Whether the Defense of Failure to Exhaust Internal Union Remedies Is Available in an Action Other Than One Involving Solely Internal Union Affairs

A. Certiorari Should Be Denied for the Reason That the Decision of the Court Below Is Not in Conflict With Any Decision of This Court

The court below held that Murray could not maintain his action against Local 557 because of his failure to exhaust internal union remedies available to him under the Teamsters' Constitution. In his Petition Murray asserts that the decision is in conflict with the decision of this Court in *National Labor Relations Board v. Industrial Union of Marine & Shipbuilding Workers of America*, 391 U. S. 418 (1968) ("*Marine Workers*"), which, according to Murray, holds that exhaustion of internal union remedies may be required as a prerequisite to a suit against the union only where the action involves internal union matters.

Marine Workers does not support Murray's position. The holding of that case was simply that a union could

not expel a member for failure to exhaust internal union remedies prior to filing an unfair labor practice charge, where the member's complaint or grievance did not concern an internal union matter, but touched a part of the public domain covered by the National Labor Relations Act. 391 U. S. at 428. The Court therefore ordered enforcement of an order by the National Labor Relations Board finding the union guilty of an unfair labor practice as a result of the member's expulsion. *Marine Workers* did not expressly or impliedly consider the issue of the availability of the defense of failure to exhaust internal union remedies in the context of a civil action, such as the instant one, alleging a breach of the duty of fair representation in the handling or the processing of a grievance. There is thus no conflict between the decision of the court below and the decision of this Court in *Marine Workers* upon which to base a grant of certiorari.

B. Certiorari Should Be Denied for the Reason That the Decision of the Court Below Is Not in Conflict With the Decision of Any Other Circuit Court

Contrary to the contention of Murray, no Circuit Court has held that the defense of failure to exhaust internal union remedies is available only in an action involving solely internal union affairs. To the contrary, every Circuit Court which has considered the issue has recognized the defense in an action alleging a breach of the union's duty of fair representation in the handling or the processing of a grievance. *See, e.g., Winters v. Local Union No. 639, IBT*, 569 F. 2d 146, 148 (D. C. Cir. 1977) ("the circuit courts have unanimously upheld the exhaustion requirement and commended its utility"); *Baldini v. Local Union No. 1095, United Auto Workers*, 581 F. 2d 145 (7th Cir. 1978); *Rainey v. Missouri Utilities Co.*, 596

F. 2d 310 (8th Cir. 1979); *Clayton v. ITT Gilfillan*, — F. 2d —, 104 LRRM 2118 (9th Cir. 1980); *Varra v. Dillon Companies, Inc.*, 615 F. 2d 1315 (10th Cir. 1980). In applying this principle, however, the Circuit Courts have also recognized that the obligation to exhaust internal union remedies will be excused where those remedies are shown to be inadequate or where resort to those remedies would be futile. *See, e.g., Winter v. Teamsters Local 639, supra; Geddes v. Chrysler Corp.*, 608 F. 2d 261 (6th Cir. 1979); *Imel v. Zohn Mfg. Co.*, 481 F. 2d 181 (10th Cir. 1973), *cert. denied*, 415 U. S. 915 (1974). Federal courts have, not unexpectedly, differed in their application of these principles to the facts of the cases before them, but there is no difference of opinion among the Circuit Courts as to the legal principles applicable to those facts.

The decision of the court below was fully consistent with the foregoing Circuit Court decisions. The court first held that the defense was available to Local 557, and noted that there were exceptions to the requirement of exhaustion. It held, however, that on the facts presented by Murray he had not demonstrated either inadequacy or futility of the remedies available to him. There is thus no conflict or inconsistency between the decision of the court below and any other Circuit Court decision. The Petition should therefore be denied.

II. The Issue of the Availability to the Employer of the Defense of Failure to Exhaust Internal Union Remedies

A. Certiorari Should Be Denied for the Reason That the Decision of the Court Below Is Not in Conflict With Any Decision of Any Other Circuit Court

The court below held that, under the circumstances of the instant case, the defense of failure to exhaust in-

ternal union remedies was available to Branch. The court recognized that although the defense was not always available to the employer, it was properly available in this case because resort to internal union remedies could have obviated the need for the suit against Branch. In so holding, the court below followed widely recognized principles of federal labor law and policy, and applied legal principles consistently followed by the Circuit Courts.

In section 203(d) of the Labor Management Relations Act, 29 U. S. C. § 173(d), Congress expressed its mandate that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." In furtherance of this policy this Court has consistently held that, except in unusual circumstances, it is inappropriate for a federal court to interject itself in a labor/management dispute unless and until all contractual remedies have been exhausted. *See, e.g., Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965). Even at that point, however, the decision reached at the conclusion of the contractual process is not subject to review by a federal court except in unusual and limited circumstances. *See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

It is well settled that arbitration is the favored alternative forum for dispute resolution. *Gateway Coal v. United Mine Workers of America*, 414 U. S. 368 (1974). In furtherance of these policies, federal courts, as discussed below, have required an employee to resort to internal union remedies where such resort could result in the resolution of the dispute between the employee and the employer through the arbitration process.

The circumstances under which the exhaustion defense may be available to the employer have been described in a series of opinions by the Seventh Circuit Court of Appeals. *See Baldini v. Local Union No. 1095, United Auto Workers, supra; Harrison v. Chrysler Corp.*, 558 F. 2d 1273 (7th Cir. 1977); *Orphan v. Furnco Construction Corp.*, 466 F. 2d 795 (7th Cir. 1972).[3] The Seventh Circuit has recognized that the defense is available to the employer when the exhaustion of internal remedies by the plaintiff would have obviated the necessity of the plaintiff's bringing the action against the employer. Where there are internal procedures by which the union may consider the propriety of past actions and take steps to remedy them, the employee must exhaust those remedies before bringing suit against the employer.

> Intraunion appellate procedures may be a method by which fair representation may be regained and the grievance procedure revived. The employer may

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3. The most recent Seventh Circuit case considering the issue is *Miller v. Gateway Transportation Co., Inc.*, 616 F. 2d 272 (7th Cir. 1980), where the court held that the defense was not available to the employer under the circumstances of that case. That decision, however, is not based upon any disagreement with the principle articulated in the text, but upon the court's conclusion that the remedies available to the plaintiff could not have resulted in a review of a prior decision rendered against the plaintiff in the grievance procedure. 616 F. 2d at 275. *Miller* is thus not in conflict with any of the Circuit Court decisions discussed above, or with the decision of the court below. As this Court has made clear, a conflict between circuits which will justify discretionary review must be a real conflict on the same matter of law or fact, and not merely an inconsistency in dicta or in the general principles utilized. The conflict must be a "real and embarrassing conflict of opinion and authority between the circuit courts of appeals." *Layne and Bowler Corp. v. Western Wells Works, Inc.*, 261 U. S. 387, 393 (1923).

> properly assert that the employee has an obligation under the collective bargaining agreement to resort to intraunion appellate procedures for this limited purpose. To raise this defense, however, the employer must establish that an intraunion appeal could result in reversal of the union's refusal to press the grievance and that the grievance could be reinstated in accordance with the provisions of the collective bargaining agreement.

Harrison v. Chrysler Corp., supra at 1278-79.

In *Orphan v. Furnco Construction Corp., supra,* the Seventh Circuit stated that the defense would be available to the employer where ". . . . an intra-Union appeal procedure could result in a reversal of the Union's action in refusing to process a grievance and a concomitant timely filing or reinstating of the grievance according to the provisions of the collective bargaining agreement."

The reasoning of the Seventh Circuit in *Harrison* and *Orphan* is both logical and consistent with federal labor policy, and has been recognized as such by other Circuit courts. For example, the District of Columbia Circuit Court of Appeals in *Winter v. Local Union No. 639, IBT, supra,* held that under the circumstances of that case the exhaustion defense was not available to the employer. The Court suggested, however, that the reasoning of the Seventh Circuit in *Orphan* might make the defense available to the employer where resort to internal union procedures might obviate the necessity of suing the employer. 569 F. 2d at 151 n. 6. *See, also, Varra v. Dillon Companies, Inc., supra.*[4]

4. In *Geddes v. Chrysler Corp.*, 608 F. 2d 261 (6th Cir. 1979), the Sixth Circuit held that the defense of failure to exhaust internal union remedies was not available to the employer because it was not a party to the membership agreement between the employee

The Ninth Circuit Court of Appeals recently had an opportunity to consider the availability to the employer of the defense of failure to exhaust internal union remedies in *Clayton v. ITT Gilfillan, supra.*[5] In *Clayton,* the Ninth Circuit held that the defense was available to the employer only if by exhausting internal remedies the employee could obtain the same relief sought in a civil action against an employer. In so holding, the court in *Clayton* approved the analysis of the issue set forth in *Harrison v. Chrysler Corp., supra* at 1278-79, which, as set forth above, permits the employer to rely on the defense where exhaustion of internal remedies might place the grievance procedure back on its proper course. — F. 2d at —, 104 LRRM at 2121 n. 6.

Clayton is thus consistent with the decision of the court below and with cases cited therein.[6] The court below held that had Murray utilized internal union remedies he could have obviated the necessity of the instant action. Murray was aware as early as October, 1975 of the allegedly uncertain status of, and his dissatisfaction with, the terms of the settlement of his September, 1975 discharge grievance. He was also aware of the availability of internal remedies under the Teamsters Constitution, but he consciously decided not to avail himself of those remedies.

4. (Cont'd.)
and the union which gave rise to the obligation to exhaust. In that case, however, the court was not faced with a situation in which resort to internal remedies could have placed the grievance procedure on track. It is thus not in conflict with any of the cases discussed in the text.

5. Cross-Petitions for a Writ of Certiorari in *Clayton* are pending in this Court in Case Nos. 80-54 and 80-5049, filed July 11, 1980.

6. In reaching its decision the court below cited *Peterson v. Rath Packing Co.,* 461 F. 2d 312 (8th Cir. 1972); *Harrison v. Chrysler Corp., supra;* and *Orphan v. Furnco Construction Corp., supra.*

Had he done so, his Business Agent would have been subject to an order to "perform . . . a specified act," which would have been the filing of a grievance to have the settlement of his earlier grievance clarified by the joint committees under the contractual grievance procedure.[7]

7. The joint committees clearly would have had the authority to clarify the matter, and enter an appropriate order binding the parties, in light of their very broad power to "settle" disputes. In this regard, Murray argues strenuously in his Petition that such a grievance would have been time-barred, and that resort to internal union remedies would therefore have been futile. This contention misses the point. The grievance which would have resulted from exhaustion of internal remedies would not have been directed to the merits of Murray's discharge or suspension in September, 1975, but rather to the terms of the settlement of the earlier grievance. Such a grievance would not have arisen until Murray's Business Agent had been ordered to file the grievance, and thus would not have been time-barred.

Murray's failure to appreciate this distinction is reflected in the contention raised in his Petition that he was denied "due process" because the Fourth Circuit accepted and relied upon an off-the-record statement by counsel for Branch at oral argument to the effect that Branch would have waived contractual time limits had a grievance been filed. (Petition pp. 29-30) In fact, the Opinion of the Fourth Circuit contains no such statement. Rather, the court states only that "[t]he employer concedes that if Murray is successful in establishing through his intra-union remedy that he was not fairly represented in the grievance arising out of his discharge or in the original disciplinary action upon which the discharge was based, the employer would be bound to reconsider its action." (Petition pp. 37-38) The concession referred to by the Fourth Circuit was nothing more than an acknowledgement by counsel for Branch, in response to a question from the Panel, that had a grievance concerning the settlement resulted from Murray's resort to internal union procedures Branch would have had an obligation to take part in the grievance proceedings, and to be bound by the outcome. That statement is nothing more than a reiteration of Branch's contractual obligation, and hardly amounts to a violation of Murray's constitutional rights.

The linchpin of the court's opinion is its conclusion that had Murray pursued internal union remedies the grievance procedure would have been placed back on track, and would have been given full play in the resolution of the dispute between Murray and Branch. This conclusion is fully consistent with the legal principles articulated in the cases discussed above. There is thus no conflict among the Circuits, and no reason for granting the Petition.

III. Certiorari Should Be Denied for the Reason That the Issues Raised by Petitioner Turn Solely Upon an Analysis of the Particular Facts of This Case

As is apparent from Murray's statement of the Questions Presented for Review in this matter, as well as his supporting arguments, he is seeking a review of the decision of the court below essentially because of his disagreement with the factual conclusions reached by that court and the district court. Specifically, he disagrees with the conclusion that exhaustion of internal union remedies would have provided an adequate remedy for the alleged breach of the NMFA by Branch, that resort to those remedies would not have been futile, and that resort to those remedies would have restored the dispute between Branch and Murray to the contractual grievance procedure.

The decision of the court below was premised upon legal principles consistently recognized and applied by federal courts. Applying those principles to the facts of this case, the court concluded that Murray was aware of the availability of internal remedies, that the resort to those remedies could have resulted in the filing of a grievance under the NMFA clarifying the terms of the settlement of Murray's September, 1975 discharge grievance, and that the necessity of the instant action therefore would

have been obviated. Any review of that decision by this Court will of necessity involve an analysis of the propriety of the factual determinations by the court below, and not the clarification or articulation of disputed legal principles.

Similarly, Murray argues that the court below erred in concluding that the remedies provided by the Teamsters Constitution are "inadequate" and that he therefore had no obligation to exhaust those remedies. Murray's argument, however, is no more than a disagreement with a factual conclusion reached by the court below. Whether or not the court was correct in its assessment of the remedies available under the Teamsters Constitution, it made that assessment, as discussed above, in the course of applying proper and undisputed legal principles.

As this Court has consistently held, it does not "grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U. S. 220, 227 (1925). Murray is requesting the Court to make just such a review in this case. Certiorari should therefore be denied.

CONCLUSION

In concluding that Murray's admitted failure to exhaust internal union remedies precluded the maintenance of his action against both Branch and Local 557, the court below followed legal principles long recognized and applied by Circuit Courts. Murray's disagreement with the decision of the court below lies not with the legal principles articulated by the court, but with the factual conclusions to which those principles were applied. The decision is of importance solely to the litigants to this case, and turned on facts unique to this case. There are thus no special or important reasons favoring an exercise of this Court's discretionary power of review. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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